(2)

No. 04-636

IN THE

Supreme Court of the United States

FRIENDS OF FALUN GONG, *et al.*,

Petitioners,

v.

PACIFIC CULTURE ENTERPRISE, INC., d/b/a The China Press; SING TAO NEWSPAPERS NEW YORK, LTD., d/b/a Sing Tao Daily; and DAVID MUI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS SING TAO NEWSPAPERS NEW YORK, LTD. AND DAVID MUI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the courts below properly applied the settled principles of New York's common law of defamation to preclude members of a religious sect from asserting individual claims for damage to their own reputations allegedly resulting from a false and defamatory news report discussing only the practices of the sect itself?

LIST OF PARTIES BELOW

The list of petitioners identified in the Petition (at ii) does not match the list of individual plaintiffs named in the Amended Complaint (at ¶ 3). The list of petitioners includes five individuals who were not plaintiffs but were identified as appellants before the Court of Appeals (Meimiao Lee, Xu Kangpang, Lan Sing Cheng, Yahong Bai and Shihuan Qu), and excludes two individuals who were plaintiffs but did not participate in the appeal (Zhuli Chen and Lihua Zhao).

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The ultimate parent company of Respondent Sing Tao Newspapers New York Ltd. is Global China Group Holdings Limited, a publicly held, Hong Kong-based corporation that is registered in Bermuda. The shares of the parent company are traded on the Hong Kong stock exchange. No other corporation or publicly held company owns 10% or more of the stock of Sing Tao Newspapers New York Ltd.

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PRELIMINARY STATEMENT

The Petition for a writ of certiorari to review an unpublished Summary Order of the United States Court of Appeals for the Second Circuit issued on August 9, 2004 should be denied. The Petition seeks further review of a straightforward application of the common law of New York that, like every other state, requires an allegedly libelous article to be "of and concerning" the named plaintiff. Because none of the articles challenged in this lawsuit identified any of the 68 plaintiffs who sought to assert individual libel claims, the pleading fundamentally failed to state a claim for libel. The Petition presents no federal question, raises no issue of uncertainty among the circuits, and presents no clear error of law that warrants further review by this Court.

COUNTER-STATEMENT OF THE CASE

A. Background

The 68 plaintiffs below were individual practitioners of Falun Gong, a Chinese spiritual sect, and an association devoted to supporting the Falun Gong practice. (8a)[1] Through this action they sought to assert several claims against two Chinese language daily newspapers published in New York City, based entirely upon their publication of unflattering reports about the Falun Gong religious sect.

Respondent Sing Tao Newspapers New York Ltd. ("Sing Tao") publishes one of the challenged newspapers,

1. References cited "__a" refer to Appendix A and Appendix B annexed to the Petition for a Writ of Certiorari filed on November 8, 2004. References to "JA __" are to the Joint Appendix filed with the Court of Appeals.

the *Sing Tao Daily* with a daily circulation of about 35,000. Sing Tao is owned by a privately-held company that has published the independent *Sing Tao Daily* in Hong Kong continuously since 1938.[2] Respondent David Mui, a U.S. citizen, was formerly the editor in chief of *Sing Tao Daily* in New York. (9a n.1.)

The claims asserted against Sing Tao arose out of its publication of just one article, a September 20, 2001 news report that briefly described a number of religious sects from around the world, including the "Solar Temple," "People's Temple," "Branch Davidians," "Supreme Truth" and others. (JA 366-67.) This article contained two-paragraphs about Falun Gong: one paragraph described generally the public teachings of the founder of the sect; the other repeated published news accounts about activities by Falun Gong practitioners in China, including "delay of medical treatments or suicidal acts, even self-mutilations" that resulted from its "anti-science and anti-society teachings." *See* JA 360, 366-67 (uncertified translation of Sing Tao article annexed to Amended Complaint). The Sing Tao article did not name or otherwise identify any of the 68 plaintiffs, and it described activities occurring only in China, not in New York area where the plaintiffs reside.

After the article was published, Sing Tao received several letters from Falun Gong practitioners, who objected to the accuracy of its depiction of their sect, including an October 21, 2001 letter from an attorney who "serve[d] notice" that the article gave rise to claims for defamation by Falun Gong practitioners. (JA 494-96.) Never intending to misrepresent Falun Gong, Sing Tao immediately negotiated with this

2. *See* http://www.globalchina.com/eng/media_ownership_services.shtml.

attorney and reached an agreement to resolve the dispute by publishing an article about Falun Gong written entirely by practitioners of Falun Gong, without editorial revision or comment by Sing Tao. (JA 497.) Good to its part of the bargain, on October 28, 2001 the *Sing Tao Daily* carried a full-page article written *entirely* by local practitioners of Falun Gong. (JA 498.)

B. Procedural History and Nature of the Claims Asserted

Notwithstanding the implementation of this settlement, and the absence of *any* further reports about Falun Gong appearing in *Sing Tao Daily*, some six months later Sing Tao was served with a state court Complaint alleging libel based on the original September 20, 2001 news report, and an Order to Show Cause demanding an emergency injunction to prevent any further publication of defamatory articles about Falun Gong. (JA 15-17.) The pleadings did not mention the settlement agreement, the favorable, in-depth report published on October 28, 2001, or the absence of any further stories warranting any emergency judicial action.

The libel claims against Sing Tao asserted that each of the plaintiffs was personally defamed because the September 21, 2001 article, *inter alia*, falsely described the teachings of Falun Gong's founder as being "anti-science, anti-society, anti-civilization," and falsely described some Falun Gong practitioners in China as having delayed medical treatments and participated in self-mutilation. (JA 146, 147 at ¶¶ 37-40, 49.)

The New York state court (Hart, J.), rejected out of hand petitioners' initial demand for an order prohibiting *Sing Tao Daily* and its primary competitor, *China Press*, from

publishing any "further libelous articles defaming the plaintiffs" or "any photographs of the plaintiffs without their consent." (JA 127, 134.) The state court found not "one iota of evidence" to justify such a prior restraint. (10a.)

Petitioners then filed an Amended Complaint dropping certain parties and causes of action, and adding a new federal cause of action under 42 U.S.C. § 1985(3) ("Section 1985(3)"). Respondents timely removed the case to the District Court for the Eastern District of New York on August 13, 2002. (10a.) No request for remand was made.

The Amended Complaint advanced several theories of liability: (1) a private conspiracy in violation of Section 1985(3) to abridge petitioners' freedom of religion by publishing false information about their spiritual practices, (2) individual claims of defamation asserted by each of the 68 plaintiffs, none of whom was alleged to be a leader in the Falun Gong sect or to have been identified in the challenged news report, and (3) a tag-along claim for "prima facie tort" that was not pursued on appeal. (JA 156.) The pleading also referred obliquely to a violation of New York Civil Rights Law § 40-c, in asserting a conspiracy to violate the freedom of religion (JA 155 at ¶ 101), and the courts below treated this as an inartfully drafted independent state law claim. (4a; 29a.)

C. The Holdings of the Courts Below

District Court Dismissal. Respondents moved under Fed. R. Civ. P. 12(b)(6) to dismiss the Amended Complaint in its entirety for failure to state a claim. (14a-15a.) Their motions were granted by the District Court (Amon, J.) on September 26, 2003. (8a-33a.) The Section 1985 claim was dismissed

because the Amended Complaint failed to plead "any facts that could support an inference of a conspiracy among the various defendants" (17a), and even accepting the possibility of a conspiracy, failed to allege the involvement of a constitutional "state actor," a necessary prerequisite to any claim for the violation of rights protected only against state encroachment. (18a-20a.)

Recognizing that all the claims alleged were "so related" as to form a part of the same controversy, and after weighing "the interests of judicial economy, convenience, fairness to litigants, and comity," Judge Amon decided to exercise subject matter jurisdiction over the pendent state law claims, whose outcome was "plain." (21a-22a.) The district court found the libel claims to be flatly precluded because the allegedly defamatory statements do not "reasonably give rise to the conclusion that they particularly reference any of the plaintiffs" (23a), and the common law "group libel" doctrine bars an individual from bringing a claim for libel based only upon statements about a group to which he or she belongs. (23a-26a.) The district court found that the individual libel claims were barred both because of the "sheer numbers" of Falun Gong practitioners in New York, admitted by petitioners to exceed several hundred in New York alone and millions worldwide (Appellants' Br. at 28), and because the petitioners offered "no reason to believe that the particular plaintiffs in this case were identifiable within the group of New York based practitioners." (24a & n.3.)

The district court further concluded that no claim was stated under New York Civil Rights Law § 40-c because none of the individual plaintiffs alleged that he or she had suffered any specific act of religious discrimination as a result of challenged publications (JA 559), and dismissed the claim

for prima facie tort as barred by the First Amendment (JA 556-57), a holding not challenged on appeal.

Summary Affirmance by the Court of Appeals. In an unpublished Summary Order, the Court of Appeals (Pooler, Sack and Raggi, C.J.J.) affirmed the dismissal. The Second Circuit found that the district court had properly rejected the Section 1985(3) claim because the Amended Complaint "failed to allege a conspiracy by defendants either to deprive them of their First Amendment rights or to hinder governmental authorities from securing to them their First Amendment rights." (3a.) The court found the conspiracy allegations similarly defective in attempting to state a claim based upon a violation of New York Civil Rights Law § 40-c. (4a) These claims are not pursued in the Petition, which seeks only this Court's review of the adequacy of the state law claims for libel.

The Second Circuit affirmed the district court's holding that no libel claim was stated by any of the 68 plaintiffs because none of the challenged articles is about them. As the Court of Appeals observed, the challenged articles instead "are about either individual practitioners of Falun Gong who are not plaintiffs in this suit, Falun Gong itself, or the group of New York-based Falun Gong practitioners. They are therefore not 'of and concerning' any of the plaintiffs." (5a.) In reaching this conclusion, the Court applied the New York common law standard, as articulated in *Brady v. Ottaway Newspapers, Inc.*, 84 A.D.2d 226, 228, 445 N.Y.S. 2d 786, 788 (2d Dep't 1981), which requires that "the allegedly defamatory content refer to the plaintiff." (4a.)

REASONS FOR DENYING THE PETITION

THE PETITION RAISES NO FEDERAL QUESTION AND PRESENTS NO CLEAR ERROR OF STATE LAW

A. Petitioners' Libel Claims Were Properly Dismissed Under the Common Law of New York

The courts below dismissed the individual libel claims advanced by 68 plaintiffs purely as a matter of state common law. Applying the long-standing requirement that an allegedly libelous article must be "of and concerning" the named plaintiff, the courts below readily concluded that petitioners had not, and could not, make the necessary showing. The district court observed that the challenged articles do not identify petitioners "either as members of a group or an identifiable sub-group" (23a), and do not "reasonably give rise to an interpretation that they are 'of and concerning' the [petitioners]." (26a.) The Court of Appeals summarily affirmed, finding the pleading to be defective "on its face" because none of the articles were "of and concerning" any of the petitioners, and the common law allows individuals to sue for defamatory comments about a group to which they belong only when the group is "sufficiently small or circumstances otherwise indicated that the articles referred particularly to an individual plaintiff. Neither circumstance obtains here." (5a; citation omitted.)

The common law requirement that a libel must be "of and concerning" a named plaintiff is long-standing, easily understood and consistently applied. *See, e.g., Albert v. Loksen*, 239 F.3d 256, 265-66 (2d Cir. 2001) ("of and concerning" is a necessary element of a defamation

plaintiff's burden of proof); *Geisler v. Petrocelli*, 616 F.2d 636, 640 (2d Cir. 1980) (libel plaintiff must show that defamation statement specifically refers to plaintiff); *Fetler v. Houghton Mifflin Co.*, 364 F.2d 650, 651 (2d Cir. 1966) (same); *see also*, 1 Sack on Defamation § 2.9 at 2-126 (3d ed. 2004). The "group libel" doctrine as applied in New York is simply an application of this principle, providing that an allegedly false statement about a group is not generally "of and concerning" any individual member of the group. *See, e.g., Church of Scientology Int'l v. Behar*, 238 F.3d 168, 173 n.1 (2d Cir. 2001); *National Nutritional Foods Ass'n v. Whelan*, 492 F. Supp. 374, 380 (S.D.N.Y. 1980); *In re Houbigant, Inc.*, 182 B.R. 958, 974 (Bankr. S.D.N.Y. 1995).

Petitioners argue that the courts below failed to apply the group libel doctrine as required by the common law of New York (Pet. 20-24), but the contention is plainly without merit. The Court of Appeals relied upon the very state court authority petitioners say should be controlling, *Brady v. Ottaway Newspapers, Inc.*, 84 A.D. 2d 226, 445 N.Y.S.2d 786 (2d Dep't 1981), and found that the Amended Complaint failed to pass muster under a simple application of this precedent. (5a.) Petitioners object that the Second Circuit could not properly have applied the "intensity of suspicion" standard embraced in *Brady*, and must have mistakenly applied a strict numerical standard (20a-22a), but the Summary Order notes *both* that the group of Falun Gong practitioners (at least several hundred in New York City and millions worldwide) would generally be considered too large to allow an unnamed member to claim reputational damage from an article about the group, *and* that no other circumstances "indicated that the articles referred particularly to an

individual plaintiff." (5a.) This holding is consistent with the settled law in New York.[3] *See* Sack on Defamation at 2-126 - 2-128 (citing cases); *see also, e.g., Neiman-Marcus v. Lait*, 13 F.R.D. 311, 316 (S.D.N.Y. 1952) (no libel claim for members of a group of 382); *Sacco v. Pataki*, 114 F. Supp. 2d 264, 271 (S.D.N.Y. 2000) (no libel claim for members of a group of over 1000 people), *aff'd sub nom Abramson v. Pataki*, 279 F.3d 93 (2d Cir. 2002)

Of course, even if the Second Circuit had misperceived the law of New York, which it did not, such an error of state law would not present a question warranting further review by this Court. *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944); *accord Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985) (lower courts are "more able to interpret the laws of their respective [s]tates"); *Ragan v. Merchants Transfer and Warehouse Co.*, 337 U.S. 530, 534 (1949) ("We ordinarily accept the determination of local law by the Court of Appeals"). This is particularly so given that the application of the common law doctrine in this case did not require any extension of existing law. Indeed, with regard to Sing Tao, the facts presented only reinforce one reason for the very existence of the doctrine—to prevent the unwarranted proliferation of litigation. Upon receiving a complaint from one group of Falun Gong practitioners, not identified in its story, Sing Tao agreed to run a full

3. The Petition is equally incorrect in its further suggestion (at 22-23) of a due process violation because the Summary Order of the Second Circuit does not state more explicitly how it applied the *Brady* decision to this dispute. *See, e.g., Taylor v. McKeithen*, 407 U.S. 191, 194 n.4, (1972) ("courts of appeals should have wide latitude in their decisions of whether or how to write opinions").

page story to set the record straight. Six months later, it was sued by a second group of Falun Gong practitioners, also not identified in the story. The group libel doctrine properly seeks to avoid the chilling impact of just such claims by individual members of groups who dislike the reporting about their organizations.

Petitioners' libel claims were properly dismissed purely as a matter of New York law.

B. There Is No Disagreement Among the Circuits About the Scope of New York's Libel Law

Petitioners are just as misdirected in claiming widespread uncertainty about the application of New York law to libel claims brought by members of groups. It has long been recognized that New York law limits libel recoveries to situations where an alleged libel is "of and concerning" the plaintiff, and in a group context the courts regularly look to both the actual size of a group and other circumstances that might uniquely identify and harm a specific member of the group—exactly what the courts did here. *See, e.g. Abramson v. Pataki*, 278 F.3d 93, 102 (2d Cir. 2001) (under New York law no libel claim for union members based on statement accusing some employees of criminal behavior); *Anyanwu v. Columbia Broad. Sys., Inc.*, 887 F. Supp. 690, 693 (S.D.N.Y. 1995) (under New York law no libel claim for a Nigerian doing business in the U.S. based on defamatory reference to all Nigerians doing business in the United States); *Church of Scientology Int'l v. Time Warner, Inc.*, 806 F. Supp. 1157, 1160-62 (S.D.N.Y. 1992) (under New York law no libel claim could be brought by an individual church for statements critical of the religion to which it belonged),

aff'd sub nom Church of Scientology Int'l v. Behar, 238 F.3d 168 (2d Cir. 2001); *National Nutritional Foods Ass'n*, 492 F. Supp. at 380-81 (under New York law no libel claim could be brought by individuals in health food industry for statements critical of that industry). Similar limitations on libel claims by members of groups exist in all 50 states. *E.g.*, *Brock v. Thompson*, 948 P.2d 279, 292 (Okla. 1997) (no libel claim for statement denigrating all Oklahoma plaintiffs' lawyers); *Kentucky Fried Chicken of Bowling Green, Inc. v. Sanders*, 563 S.W.2d 8, 8-9 (Ky. 1978) (no libel claim by local franchisee based on complaints about the quality of Kentucky Fried Chicken food).

Although the precise contours of the group libel doctrine may vary from state to state, as suggested by the differing language used in cases from different jurisdictions cited in the Petition (at 16-19), there is no ambiguity or uncertainty about the scope of New York's common law of libel as applied to the members of groups. The Petition presents nothing to the contrary.

C. New York's Limitation on Group Libel Claims Does Not Violate Petitioners' First Amendment Rights

Petitioners strain to argue some implicit constitutional problem with the holding below, when none exists. They note that false speech is not constitutionally protected, and suggest that the group libel doctrine as applied in this case improperly protects false speech. (Pet. 12-13.) Far from undercutting the principles enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), however, the group libel doctrine exists at common law

to avoid otherwise unacceptable restrictions on free speech. Members of large groups are barred from asserting individual defamation claims based on reports that do not specifically identify them, in order to prevent "the unwarranted proliferation of litigation and its attendant cost to free expression." Sack on Defamation at 2-134; *see also* Restatement [Second] Of Torts § 564A, cmt. a (1977-2004).

A defamation judgment not constrained by the "of and concerning" element might well run afoul of the First Amendment by chilling protected speech. *See Rosenblatt v. Baer*, 383 U.S. 75, 81 (1966) (evidence must show that a false and defamatory statement was "specifically directed at the plaintiff"); *Talal v. Fanning*, 506 F. Supp. 186, 187 (N.D. Cal. 1980) ("[i]f the court were to permit an action to lie for the defamation of such a multitudinous group [as adherents to the Islamic Faith] we would render meaningless the rights guaranteed by the First Amendment to explore issues of public import"); *Puerto Rican Legal Defense Fund v. Grace*, 9 Media L. Rep. 1514, 1516 (Sup. Ct. N.Y. Co. 1983) (permitting lawsuit that would restrict discussion about racial or ethnic groups could "inhibit the free and open discussion of matters of public interest, and conflict with First Amendment guarantees"). The converse, however, is not true. *See Paul v. Davis*, 424 U.S. 693, 710-12 (1976) (no constitutional basis to require a state to provide a libel cause of action where one is denied by state law).

The application of the common law doctrine in this case did not subvert any First Amendment protection of petitioners' reputations, and the straightforward application of New York's libel law below presents no constitutional issue.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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